PP

v.

DUIS AKIM & ORS

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
SULONG MATJERAIE J
[CRIMINAL TRIAL NO: K 47-03-2001]
1 JUNE 2005

CRIMINAL PROCEDURE: *Remand - Further remand by magistrate - Whether proper - Criminal Procedure Code, ss. 117, 177A, 259*

CRIMINAL PROCEDURE: *Transfer of cases - Transfer to High Court - Consent of Public Prosecutor for conduct of prosecution - Whether s. 177A Criminal Procedure Code complied with - Whether s. 177A CPC ultra vires art. 145(3) Federal Constitution*

CRIMINAL PROCEDURE: *Charge - Legality of - Date and time stated in charge by police officer differed from that by DPP - Manner in which murder took place also not specified - Whether charge proper*

The three accused were arrested on 22 June 2001 and were produced before the magistrate on 4 July 2001 to face a charge of murder under s. 302 Penal Code ('PC'). The charge was read but no plea was recorded. After the charge was read, the prosecuting officer ('PO') requested for a mention date under s. 259 CPC pending receipt of the chemist report. The magistrate ordered the mention date at 6 August 2001 and a weekly remand thereafter under s. 259 CPC. On 10 July 2001 the accused were brought back to court where the remand was extended until 17 July 2001. On 26 July 2001 the magistrate allowed an application by the prosecution to enable the accused to be sent to hospital for medical examination after allegations by family members that they were beaten up by the police. When the case was brought up for mention as scheduled on 6 August 2001 a request was made for another date as the chemist and post-mortem reports were still unavailable. Counsel for the accused then urged the court to discharge the accused on the grounds that their detention was illegal. The magistrate rejected that argument and ordered the case fixed for re-mention on 24 September 2001 to confirm the Public Prosecutor's consent to transfer the case to the High Court. On 24 September 2001 the magistrate ordered the case transferred to the High Court wherein a fresh charge was preferred against the accused. At the commencement of the hearing, counsel for the accused raised five preliminary objections: (1) the accused was unconstitutionally remanded; (2) the case was illegally transferred

to the High Court; (3) the prosecution was instituted without the consent of the PP; (4) s. 177A Criminal Procedure Code ('CPC') was *ultra vires* art. 145 of the Federal Constitution ('FC'); and (5) the charge was illegal because the date and time stated in the charge preferred by the police officer differed from that preferred by the DPP, and the manner in which the murder took place was not specified.

Held (dismissing preliminary objections):

[1] Where a suspect is arrested and detained and it appears that police investigations cannot be completed within 24 hours as fixed by s. 28 CPC, s. 117 CPC allows for a further detention of 15 days by the magistrate. After 15 days' remand, the police should charge the accused. In the present case the time frame from the date of arrest (22 June 2001) to the date the charge was read to them (4 July 200l) fell within the 15-day time requirement under the law. Hence, the remand was neither illegal nor unconstitutional. (pp 943 f-h & 944 a)

[2] Since the charge against the accused involved murder under s. 302 PC, the Magistrate had no power to hear the case, and the case should therefore be transmitted to the High Court as governed by s. 177A CPC. Section 177A CPC attempts to facilitate the transmission of cases triable ordinarily in the High Court. It allows for the accused to be produced before the Magistrate's Court during which time the charge will be read under the proviso of sub-s. (2) of s. 177A CPC. Although the charge should be explained to the accused, he is not called upon to plead thereto. Therefore what was done before the magistrate on 4 July 2001 in not asking the accused to plead was permissible under the law. (pp 944 b & 945 a-b)

[3] As the present case related to s. 302 PC, a report must be forwarded to the PP. The DPP would only instruct the police to charge the accused after evaluating the available evidence and after being satisfied with it. As such it could be concluded that the charge preferred against the accused on 4 July 2001 had the blessing and consent of the PP. (p 945 e-f)

[4] Although s. 177A CPC allows the arrested person to be remanded, it does not have any specific provision as to how remand should be dealt with. Remand is generally covered under ss. 117 and 259 CPC. After a lapse of 15 days, s. 117 CPC will no longer be applicable and s. 259 CPC comes into play which provides for the power to postpone or adjourn proceedings. The expression "… postpone the commencement or adjourn any inquiry or trial" is covered by the explanatory part of

s. 259 CPC. This reads that "if sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence and it appears likely that further evidence may be obtained by a remand, this is a reasonable cause for a remand." It followed that it was proper for the lower court to remand the accused under s. 259 CPC. (pp 945 h, 946 a-b & 947 b)

[5] The argument that art. 5(4) FC read together with s. 117(2) CPC only allows a magistrate to authorise detention for a term not exceeding fifteen days was without merit. The phrase "shall not be further detained in custody without the magistrate's authority" in art. 5(4) FC allows for further detention provided there is such authority and ss. 177A and 259 CPC provide the magistrate with such authority. (p 947 e)

[6] Although the order made on 4 July 2001 put 6 August 2001 as the next date for mention, the accused was brought before the court again on 10 July 2001, just six days later. This is because s. 259 CPC stipulates that the magistrate may only remand an accused to custody for a term of not more than eight days. Therefore, the Warrant of Remand in respect of all three accused issued under s. 259 CPC showed in no uncertain terms that they were properly extended until the case was referred to the High Court on 4 January 2002. (p 947 g-h)

[7] Although the grounds for further detention might not have been specifically recorded, the magistrate agreed to extend the application for remand based on what was notified earlier to the court by the PO. However, s. 259(2) CPC provided that the magistrate should state the reasons for such extension of remand and that should have been done. Nevertheless since no injustice was occasioned on the accused, it followed that the accused was correctly and properly placed on remand in accordance with the law from 4 July 2001 until the case was transferred to the High Court. (p 948 g-h)

[8] A search conducted in the case docket at the Magistrate's Court revealed that consent was issued under s. 177A(1) CPC. The consent dated 21 September 2001 allowed prosecution against all three accused. Judging from its location in the case docket, it was quite reasonable to conclude that the consent could have been sent on the alleged date of 24 September 2001. The integrity and the honesty of the DPP when he claimed that the consent dated 21 September 2001 was sent to the Magistrate's Court on 24 September 2001 was not doubted. In the circumstances, the case was legally and properly transferred to the High Court and the prosecution was instituted with the consent of the PP. (p 949 c-f)

[9] Section 177A CPC does not usurp or curtail the powers of the Attorney General under art. 145(3) FC. The consent to prosecute under s. 177A CPC lies solely with the PP and no one else. The 'caveat' found in s. 177A(1) CPC is that prosecution can only be instituted with the consent of the PP. Further, a person may be remanded in custody **but** the case shall not be further prosecuted until consent is obtained. Article 5(4) FC provides that an arrested person not released shall within twenty-four hours be produced before a magistrate and shall not be further detained in custody without the magistrate's authority. The authority given to the magistrate is found in s. 259 CPC. Such being the case, there was no question of s. 177A CPC being *ultra vires* the art. 145(3) FC. (p 951 a-b & d)

[10] Although the date and time stated in the charge preferred by the police officer differed from that preferred by the DPP, no injustice was occasioned as the accused and the deceased mentioned in the said charges were the same. In addition, the charge before this court was for the purpose of the commencement of the trial where the accused were required to plead. It should not be confused with the charge before the magistrate where the accused were never called upon to plead. Also, the charge before this court was as per the consent of the DPP as contained in his letter dated 21 September 2001. Apart from those, illus. (e) of s. 154 CPC provides that the charge need not state the manner in which the murder took place. As such, there was no need for the prosecution to specify the killing or the object used for the killing in the charge. (pp 951 h & 952 a-c)

[Preliminary objections dismissed. Remand of accused extended under s. 259 CPC. Accused to be brought back to this court on 19 September 2005.]

Case(s) referred to:
Hashim Saud v. Yahya Hasim & Anor [1977] 1 MLJ 259 ***(refd)***
Hj Mohamed Paiman v. PP [1966] 1 MLJ 58 ***(refd)***
PP v. Chua Chor Kian [1998] 1 MLJ 167 ***(refd)***
PP v. LKI Holidays Leisure Sdn Bhd [1997] 3 CLJ 739 HC ***(not foll)***
PP v. Oladatun Lukmaru & Ors [1991] 1 MLJ 187 ***(refd)***
PP v. Then Mee Kom [1983] 2 MLJ 344 ***(refd)***
Tan Foo Su v. PP [1967] 2 MLJ 19 ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 34, 117, 120, 177A, 259, 376(iii)
Federal Constitution, arts. 5(4), 145(3)
Penal Code, s. 302

Criminal Procedure Code 1973 [India], s. 309

Other source(s) referred to:
Sohoni's The Code of Criminal Procedure, 1973, 19th edn, p 3427

For the prosecution - Clarence Foo DPP
For the 1st & 2nd accused - Yunof E Maringking; M/s Maringking & Co
For the 3rd accused - Chau Chin Tang; M/s Chau & Thien

Reported by Usha Thiagarajah

RULING ON PRELIMINARY OBJECTIONS

Sulong Matjeraie J:
Immediately at the commencement of the hearing of the murder trial of Duis Akim, Vincent bin Gisup and Hendry bin Motodud (hereinafter referred to jointly as 'the accused'), the learned assigned counsel for the 1st and 2nd accused, Mr. Yunof E Maringking, raised five (5) preliminary objections as follows:

(1) The accused was unconstitutionally remanded;

(2) The case was illegally transferred to the High Court;

(3) The prosecution was instituted without consent of the Public Prosecutor;

(4) That the s. 177A of the Criminal Procedure Code ('CPC') is *ultra vires* of the Constitution; and

(5) The charge against the accused is illegal.

Datuk Chau Chin Tang, learned counsel retained by the 3rd accused, endorsed, the preliminary objections raised by Mr. Yunof E Maringking.

Brief Facts

(1) The accused was arrested on 22 June 2001 and was produced before the Magistrate on 4 July 2001 to face a charge for the murder of Welfred bin Thomas under s. 302 of the Penal Code. The charge was read and explained to the accused but no plea was recorded. The tentative charge reads as follows:

> Bahawa kamu pada 25.05.2001 jam lebih kurang 2.30 pagi, di Kedai 7 Eleven, Pekan Donggongon, di dalam Daerah Penampang, di dalam Negeri Sabah dengan niat bersama telah melakukan kesalahan Bunuh, menyebabkan kematian keatas Welfred bin Thomas dengan cara menikam menggunakan parang lalu menyebabkan kematian. Oleh yang demikian kamu telah melakukan suatu kesalahan dan boleh dihukum dibawah s. 302 Kanun Keseksaan.

After the charge was read and explained to the accused, the Prosecuting Officer, Inspector Lim Swee Beng notified the court in the following manner:

Not received chemist report.

Request (mention) date. Under section 259.

Mr. Yunof Maringking who was present on that day said: "I am retained to do a watching brief for the families of all the 3 accused would like to request for a copy of the charge."

The learned Magistrate thereafter recorded in the notes of proceeding thus:

6/8/2001 (Mention). Remand section 259 then weekly thereafter.

Signed: Siti Zulaiha Abdullah

Magistrate.

To the prosecution this charge is known as tentative charge that is before the case is transferred to the High Court. Upon receipt of the evidence needed, in this instant case, the Post Mortem and Chemist reports and upon re-evaluating the whole evidence again, only then the Public Prosecutor would issue his consent.

(2) On 10 July 2001 the three accused persons were brought back to the court where the Prosecuting Officer, Inspector Faiezul applied for the extension of the remand and said:

Mohon extend remand terhadap ketiga-tiga.

It was further recorded: "1st accused, 2nd accused and 3rd accused – faham" which means all the three accused "understood" the application for an extension of the remand period.

The notes of proceeding further say:

Remand extended until 17 July 2001, then weekly.

Signed: Ummu Kalthom Abdul Samad

Magistrate.

(3) On 26 July 2001 the notes of proceeding indicate that the learned Magistrate, Zaman Mohd Noor, allowed the prosecution's application for an 'Order to Produce Person in Custody' to enable all the accused to be brought to hospital for medical examination after an allegation by family members that the accused was beaten up by the police. The court notes read as follows:

Prosecution: Insp. Kenneth

Pohon OTP untuk membolehkan ketiga-tiga tertuduh dibawa ke hospital. During the last mention date the family members alleged they were beaten by the police.

Court: OTP to issue with covering letter stating the reason ie, to conduct a medical check up as a result of their allegation that they had been beaten. The case is under police investigation.

To 27.07.2001.

Signed: Zaman Mohd Noor

Magistrate.

(4) As scheduled, on 6 August 2001 the case was brought for mention. In the presence of the three accused and Mr. Yunof Maringking, the Police Officer told the court that the Chemist report and Post Mortem report were not ready yet and requested for another date. The case requires closer scrutiny. The notes of proceeding read:

> Prosecution: Laporan kimia, laporan postmortem belum siap lagi. Pendakwa pohon satu tarikh baru. Kes perlu penelitian teliti.

Learned counsel, Mr. Yunof Maringking, who was present on 6 August 2001 urged the court to discharge the accused and alleged that the detention of the accused was illegal.

The learned Magistrate in rejecting learned Mr. Yunof Maringking's argument, *inter alia*, said in the notes of proceeding:

> Today's mention is to see whether the Public Prosecutor has already given his consent to the institution of the Prosecution in the High Court **and not for further Prosecution.** (emphasis added).

Further the learned Magistrate said: "This case is fixed for re-mention to confirm whether the Public Prosecutor has given the consent or not. To 24 Septembr 2001. OTP.

Sgd: Zaman Mohd Noor"

Magistrate.

(5) On 24 September 2001 Insp. Kenneth for the prosecution said:

> Prosecution terima arahan dari Senior Federal Counsel untuk pindahkan kes ke Mahkamah Tinggi. Izin dibenarkan.
>
> Court: Kes dipindahkan ke Mahkamah Tinggi.
>
> Sgd: Zaman Mohd Noor
>
> Magistrate.

(6) On 3 January 2002, the accused was produced at the High Court where the case was fixed for mention on 1 February 2002 to fix a trial date.

At the High Court, a fresh charge was preferred against the accused and it reads as follows:

> That you all, on the 26th day of May 2001 at about 2.00 a.m. at a Seven Eleven Shop Donggongon Town in the District of Penampang in the State of Sabah in furtherance of common intention did commit murder by causing the death of one, Welfred Bin Thomas 23 years, Dusun and that you all have thereby committed an offence punishable under Section 302 of the Penal Code (F.M.S Cap 45) read together with Section 34 of the same code.

The five grounds of preliminary objections are closely connected and I shall deal with them in the manner outlined in the submission of the learned counsel at encl. 46 but there may be some inevitable overlapping of the facts and laws involved.

(1) The Accused Was Unconstitutionally Remanded

Under the provision of s. 117 CPC, when a suspect is arrested and detained and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by s. 28 and there are grounds for believing that the accusation or information is well founded the police officer making the investigation shall produce the accused before a Magistrate who may authorise the detention of the suspect for a term not exceeding 15 days. Section 117 specifically provides for the remand of a person arrested and detained in custody when it appears that the investigation cannot be completed within 24 hours as fixed by s. 28 CPC.

Our s. 117 CPC corresponds with s. 167 of the Indian CPC 1973. It comes into operation only if the investigation cannot be completed within 24 hours as fixed by s. 28 CPC. It allows the detention of a suspect to enable the police to complete their investigation, see *Hashim bin Saud v. Yahya bin Hasim & Anor* [1977] 1 MLJ 259. However, such detention shall not exceed 15 days.

After 15 days remand under the proviso of s. 117 CPC, the police shall charge the accused and in this instance case the three accused were charged on 4 July 2001. Therefore, it should be noted here that from the date of arrest, which was 22 June 2001 to 4 July 2001, being the date of the charge being read to them were all done within the 15 days time frame allowed under the law. Hence, there is therefore nothing illegal or unconstitutional here.

Since the charge involves murder under s. 302 Penal Code, the Magistrate has no power to hear the case. Such case must therefore be transmitted to the High Court. This is governed by s. 177A CPC and for easy reference it is appended hereunder in full.

Section 177A Transmission Of Case To, And Trial By, The High Court
(1) A prosecution in respect of an offence which is to be tried by the High Court in accordance with Chapter XX, shall not be instituted except by or with the consent of the Public Prosecutor:

> Provided that a person may be arrested, or a warrant for his arrest may be issued and executed, and any such person may be remanded in custody notwithstanding that the consent of the Public Prosecutor to the institution of a prosecution for the offence has not been obtained, but the case shall not be further prosecuted until the consent has been obtained.

(2) In any prosecution pursuant to subsection (1), the accused shall be produced before the Magistrate's Court which shall, after the charge has been explained to him, transmit the case to the High Court and cause the accused to appear or be brought before such court as soon as may be practical:

> Provided that when the accused is brought before the Magistrate's Court before the Public Prosecutor has consented, the charge shall be explained to him but he shall not be called upon to plead thereto.

(3) When the accused appears or is brought before the High Court in accordance with subsection (2), the High Court shall fix a date of his trial and shall be held in accordance with the procedure under Chapter XX.

It is necessary at this juncture to examine the history of the insertion of s. 177A into our CPC. This section was inserted by the Criminal Procedure Code (Amendment) Act 1995, which *inter alia*, abolished the preliminary inquiry procedure under the repealed chapter XVII of the CPC. Prior to this amendment Act, persons accused of offences ordinarily triable in the High Court had to first undergo a preliminary inquiry under the repealed chapter XVII, save for certain offences (see *Mallal's Criminal Procedure*, 5th edn – Synopsis of section [7030]-[7050] Division I p. 3281).

This section attempts to facilitate the transmission of cases ordinarily triable in High Court. Before the amendment such cases had to proceed by way of committal after a lengthy and often slow process of a preliminary inquiry.

It can also be seen here that it allows for the accused to be produced before the Magistrate's Court during which time the charge will be read and under the proviso of subsection (2). Although the charge must be explained to the accused, he is not called upon to plead thereto. Therefore what was done on 4 July 2001 before the learned Magistrate in not asking the accused to plead is allowed under the law.

The other important element of this amendment is that the consent of the Public Prosecutor. The Magistrate must wait for the consent of the Public Prosecutor to be obtained pursuant to subsection (1).

It has to be noted here that s. 120 CPC requires the police to report to the Public Prosecutor of every investigation under Part V – Information to the Police and their Powers to Investigate – Chapter XIII, unless the offence be of a character which the Public Prosecutor has directed need not be reported to him. Cases which need not be reported to the Public Prosecutor are essentially minor offences. As this instant case relates to s. 302 Penal Code, a report must be forwarded to the Public Prosecutor.

Before an instruction to the police to charge the accused could be made by the Deputy Public Prosecutor, evaluation of the then available evidence must have been undertaken and after being satisfied, instruction was given to the police to frame the charge against the accused on 4 July 2001. It is obvious therefore that the charge preferred against the accused on 4 July 2001 had the blessing and therefore the consent of the Public Prosecutor. The contention of the learned assigned counsel that the prosecution of the accused was instituted without the consent of the Public Prosecutor is without any basis.

At this stage a pertinent point was made by the learned Deputy Public Prosecutor, Tuan Amir bin Nasruddin. He asked, while waiting for the consent of the Public Prosecutor, what can the Magistrate do with the person who has been arrested and detained? He asked further, as to how the accused person can be dealt with when he is brought before the Magistrate?

Although s. 177A CPC allows the arrested person to be remanded, it does not have any specific provision as to how remand should be dealt with. Generally remand is covered under s. 117 and s. 259 CPC. As observed earlier, the accused was initially detained under s. 117 CPC. Upon such remand order being made the police forwarded the Investigation Papers to the Office of the

Deputy Public Prosecutor who thereafter instructed the police to charge the accused pending the completion of the certain reports, in this case, the Chemist and Post Mortem reports. After the lapse of 15 days, s. 117 CPC will no longer be applicable. Therefore s. 259 CPC comes into play.

Section 259 CPC provides for the power to postpone or adjourn proceedings and the full provision is as follows:

> 259(1) If, from the absence of a witness or any other **reasonable cause**, it becomes necessary or advisable to postpone the commencement of or adjourn any inquiry or trial the Court may, by order in writing, from time to time, postpone or adjourn the same on such terms as it thinks fit for such time as it considers reasonable and may, by warrant, remand the accused if in custody; provided that no Magistrate **shall remand** an accused person to custody under this section for a term **exceeding eight days at a time:** provided further that where a Government Medical Officer has certified that the complainant will not be able to give evidence before a certain date the accused may be remanded until such date notwithstanding that the term of remand may exceed eight days.
>
> (2) Every order made under this section by the Court of a Magistrate shall be in writing, signed by the presiding Magistrate, and shall state the reason therefore. Explanation – If sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence and it appears likely that further evidence may be obtained by remand, this is a reasonable cause for a remand. (emphasis added).

This section corresponds with s. 309 of the Indian CPC 1973 (Act 2 of 1974). It also corresponds with s. 198 of the Singapore CPC. This section specifically empowers the court to postpone or adjourn any proceeding in the event of the absence of any witness or any other reasonable cause. In *Tan Foo Su v. PP* [1967] 2 MLJ 19 at p. 19, Raja Azlan Shah J (as His Royal Highness then was) sagaciously said, "Reasonable cause is a term of art for lawyers and no definite ruling can be laid down, each case must be dealt with according to its own peculiar circumstances. It is no doubt an important adjunct to the administration of justice ..."

It is also pertinent to note here that subsection (2) requires that the reason for the order of postponement or adjournment must be stated.

It would appear however, that "under the Indian 1898 Code an order for remand in the course of investigation when sufficient evidence had been collected to raise a suspicion that the accused might have committed the offence, could be made under s. 344. This the court could do because of the expression in s. 344 (now s. 309) of that Code. From the words "postpone the commencement of or adjourn any inquiry or trial, it was held that during

investigation also the power to remand can be exercised under s. 344 of that code." See p. 3427 – 27. Remand when investigation not complete in *Sohoni's The Code of Criminal Procedure*, 1973 19th edition.

I agree with the submission of the learned Deputy Public Prosecutor that the expression "... postpone the commencement or adjourn any inquiry or trial" is covered by the explanatory part of s. 259 CPC which reads: "If sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence and it appears likely that further evidence may be obtained by a remand, this is a reasonable cause for a remand." Therefore I am of the view that it is proper for the lower court to remand the accused person under s. 259 CPC.

The authority of *PP v. Oladatun Lukmaru & Ors* [1991] 1 MLJ 187 as adduced by learned assigned counsel strengthened the prosecution case as it requires the consent of the Public Prosecutor before the Magistrate may transfer the case to the High Court. In the said case, the act of transmitting the case to the High Court prior to the consent of the Public Prosecutor is contrary to the legal provision.

On the argument that where art. 5(4) of the Federal Constitution read together with s. 117(2) CPC, a Magistrate can only authorise detention for a term not exceeding fifteen days, it seems to me that the phrase "shall not be further detained in custody without the Magistrate's authority" under art. 5(4) allows such detention provided there is such authority. I am of the view that ss. 177A and 259 CPC provide the Magistrate with such authority.

The other authority of *Haji Mohamed Paiman v. Public Prosecutor* [1966] 1 MLJ 58 adduced by learned assigned counsel is of no relevance as it relates to the non production of a written consent. In this instant case, as it will be shown later, written consent was produced.

It was further argued by learned assigned counsel that when the Magistrate remanded the accused under s. 259 CPC from 4 July 2001 until 6 August 2001, which is a total of more than 30 days, the Magistrate also pre-empted further weekly remand thereafter but did not record the ground for it. It has been shown earlier that although the order made on 4 July 2001 puts 6 August 2001 as the next date for mention, the accused was brought before the court again on 10 July 2001, just six days later. This was because of the provision stipulated in s. 259 CPC where the Magistrate may only remand an accused person to custody under this section for a term of not more than eight days. A perusal of the warrant of remand in respect of all the three accused persons show in no uncertain terms that the remand which were issued under s. 259 CPC were properly extended until the case was referred to the High Court on 4 January 2002.

As regards the contention that the Magistrate did not record the ground for it, this court takes judicial notice that anyone familiar with the workings of the subordinate courts would agree the fact that they have been inundated with cases, day after day especially on a day assigned to hear mention cases. It is therefore not unusual in a case scheduled for mention for the prosecuting officer to briefly notify the court the reason for the application for extension of remand. After that the Magistrate would normally give an appropriate order based on the submission of the prosecuting officer. Therefore it can be seen from the notes of proceeding dated 4 July 2001 that the prosecuting officer said that "Not received chemist report. Request (mention) date. Under s. 259."

Acting on that submission, the learned Magistrate ordered that the case be mentioned again on 6 August 2001. Remand s. 259 then weekly thereafter."

Similarly on 10 July 2001 where the prosecuting officer said: "Mohon extend remand terhadap ketiga-tiga".

The learned Magistrate extended until 17 July 2001, then weekly.

On 6 August 2001 the prosecuting officer notified the court that the Chemist report and post mortem report are not ready and that the prosecution needed another new date as the case require closer scrutiny. On 6 August 2001 the learned Magistrate did give his reason when he said: "This case is fixed for re mention to confirm whether the Public Prosecutor has given the consent or not."

On 24 September 2001, the prosecuting officer said: "Prosecution terima arahan dari Senior Federal Counsel untuk pindahkan kes ke Mahkamah Tinggi. Izin dibenarkan." The learned Magistrate said: "Kes dipindahkan ke Mahkamah Tinggi."

It can be observed from the above that although the grounds for further detention may not have been specifically recorded, it is obvious that the learned Magistrate agreed to extend the application for remand based on what has been notified earlier to the court by the prosecuting officer. Of course, s. 259(2) provides that the Magistrate shall state the reasons for such extension of remand and this should have been done. However, having regard to what has been discussed earlier, I am of the considered view that no injustice has been occasioned on the accused.

I therefore rule that the accused was correctly and properly placed on remand in accordance with the law from 4 July 2001 until the case was transferred to the High Court after the consent of the Public Prosecutor. I fail to find anything unconstitutional about it.

Items 2 And 3: The Case Was Illegally Transferred To The High Court And The Prosecution Was Instituted Without Consent Of The Public Prosecutor

As these two matters are closely related, I shall deal with them together. For fear of overly repeating myself, I wish to say that when remand order was made under s. 117 CPC, Investigation Papers are required under the law, specifically s. 120 CPC, to be sent to the Office of the Deputy Public Prosecutor. Based on the then available evidence, instruction was given by the Office of the Deputy Public Prosecutor to the police to frame the charge, known to the prosecution as the tentative charge, which is essentially to inform the accused of what offence they are facing and for what purpose they are placed on remand under the provision of s. 259 CPC.

In order to determine the accuracy of the claim by the learned Deputy Public Prosecutor that a consent letter issued by an officer appointed under s. 376(iii) CPC had been filed in the lower court, I caused a search to be made in case docket at the Magistrate's Court. I am to state categorically here that I have found in the case docket at the Magistrate's Court a consent issued under s. 177A(1) CPC by one Abdul Rashid bin Sudin, Deputy Public Prosecutor, the then Senior Federal Counsel based in Kota Kinabalu. The consent which was dated 21 September 2001 allows prosecution against all the three accused in this case. I am unable to determine as to when exactly it was received by the lower court but judging from its location in the case docket, it is quite reasonable to say that it could have been sent on the alleged date of 24 September 2001.

I have no reason to doubt the integrity and honesty of the learned Deputy Public Prosecutor when he claimed that the consent dated 21 September 2001 was sent to the Magistrate Court on 24 September 2001. In the same breath may I say here that it is also apparent to me that the Magistrate, who conducted the case on 4 July 2001, the learned Magistrate Puan Siti Zulaiha Abdullah, harbours not an iota of doubt to the claim made by the learned assigned counsel that he was "retained to do a watching brief for the families of all the three accused" when no document to that effect was ever produced in court. In the event that such a document was produced, at least it was not recorded as such in the notes of proceeding!

It is noted here that at the hearing on 24 September 2001, the Magistrate after being informed by the Prosecuting Officer thus: "Prosecution terima arahan dari Senior Federal Counsel untuk pindahkan kes ke Mahkamah Tinggi. Izin dibenarkan." allowed the case to be transferred to High Court.

"Izin dibenarkan" could also mean consent is given.

It is my considered view that after reading the ruling made by the same Magistrate, Tuan Zaman Mohd Noor on 6 August 2001 when the learned assigned counsel sought the release of the accused, it would be reasonable to expect him to demand the production of the consent from the Deputy Public Prosecutor. Alternatively, judging from the ruling, it would be reasonable to expect the learned Magistrate would not have transferred the case to the High Court without signing the consent. As can be seen the ruling that the same Magistrate made consisted of seven paragraphs and he discussed about the consent of the Public Prosecutor in at least five paragraphs thereof.

Touching on the contention of the learned assigned counsel as outlined in the last paragraph of p. 8 of encl. 46, I cannot overemphasize the fact that it is misleading to say the least that the accused was remanded under s. 177A CPC. As indicated earlier in my ruling, s. 259 CPC provides for the mechanism to allow the court to postpone or adjourn proceedings and it was under this section that the remand of the accused was extended.

It has also been explained earlier the requirement of s. 120 CPC for the Investigation Papers to be forwarded to the Office of the Deputy Public Prosecutor, who would after perusing the then available evidence give instruction to the police to frame the charge against the accused resulting on the above mentioned tentative charge. After the Chemist and Post Mortem reports are available, then the case needs a careful study. As seen in the earlier part of my ruling this cannot be taken to mean that it demonstrates that the police officer did not consult the DPP before the accused was charged for murder and that the Public Prosecutor had never obtained consent to prosecute the accused. The authorities of *Haji Mohamed Paiman v. Public Prosecutor (supra)*, *PP v. Chua Chor Kian* [1998] 1 MLJ 167 and *PP v. Then Mee Kom* [1983] 2 MLJ 344 are neither appropriate nor relevant to this instant case.

Given the facts as outlined above, I am of the considered view the case was legally and properly transferred to the High Court and that the prosecution was surely instituted with the consent of the Public Prosecutor.

Section 177A Of The Criminal Procedure Code Is Ultra Vires Of The Federal Constitution

There are two aspects of the submission of the learned assigned counsel under this heading. Firstly Article 145(3) of the Federal Constitution which conferred the Attorney General with the power to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah court, a native court or a court-martial. It is alleged that section 177A CPC tantamounts to usurpation or curtailing the discretionary power of the Public Prosecutor and indirectly authorises remand of the accused person beyond 15 days.

After discussing at great length the mechanism and procedure adopted from the investigation stage where reports must be forwarded to the Public Prosecutor as required by s. 120 CPC, up to the time when the matter is referred to the High Court, I am of the view that the powers of the Attorney General as enshrined in art. 145(3) of the Federal Constitution will not be usurped nor curtailed. The consent to prosecute under s. 177A CPC lies solely with the Public Prosecutor and no one else. The 'caveat' found in s. 177A(1) CPC is that prosecution can only be instituted with the consent of the Public Prosecutor. Further a person may be remanded in custody BUT the case shall not be further prosecuted until the consent has been obtained.

As discussed earlier s. 177A CPC provides for the mechanism of transmission of a case to and trial by the High Court. Section 259 CPC allows for postponement or adjournment of proceedings. No Magistrate may remand an accused person to custody for a term exceeding eight days at a time.

Again art. 5(4) of the Federal Constitution provides for a situation that an arrested person not released shall within twenty four hours be produced before a magistrate and **shall not be further detained in custody without the magistrate's authority:** (emphasis added). The authority given to the Magistrate is found in s. 259 CPC. Such being the case, there is no question of s. 177A CPC being *ultra vires* of the Federal Constitution.

The hypothetical question posed by the learned assigned counsel as to what would happen to the case if the Public Prosecutor declines to give his consent is not within the realm of this court's function as it is not the practice to answer such question. It is best to leave it unanswered for this court deals with facts and evidence before it and not on hypothetical question which may be answered by academicians or perhaps the learned assigned counsel himself.

The Charge Against The Accused Is Illegal

Learned assigned counsel alleged that the charge preferred by the Police Officer stated the time of committing the crime on 25 May 2001 at 2.30am and without specific reliance on s. 34 CPC. However the charge preferred by the DPP stated the time of the alleged committing of the crime as on 26 May 2001 at 2am and omitting the material particulars "dengan cara menikam menggunakan parang lalu menyebabkan kematian" and relying on s. 34 CPC.

I agree with the submission that charged read on 4 July 2001 and the charge preferred by the DPP are for one and the same offence under s. 302. The main difference is the date and the time. As the accused are still the same as well the deceased mentioned in the charge and the incidents that took place are still the same, I am of the view that no injustice has been occasioned here.

The charge before this court today is for the purpose of the commencement of the trial where the accused is required to plead and it should not be confused with the charge before the Magistrate where the accused was never called upon to plead thereto. There cannot be any confusion as the person alleged to have been murdered remained the same and no murder can happen twice.

The charge before this court is as per the consent of the Deputy Public Prosecutor as contained in his letter dated 21 September 2001 after a thorough evaluation of the evidence had been done.

In view of illustration (e) of s. 154 CPC where it says as follows: "A is accused of the murder of B at a given time and place. The charge need not state the manner in which A murdered B", I feel that there is no need for the prosecution to specify the killing or the object used for the killing in the charge. As such the decision in *PP v. LKI Holidays Leisure Sdn Bhd* [1997] 3 CLJ 739 need not necessarily apply in this instant case.

I have read the submission of both the learned Deputy Public Prosecutor and the assigned counsel and I have also gone through the authorities adduced in this court and I am satisfied that there has not been any blatant disregard of the constitutional rights of the accused. Every thing appears to have been done lawfully and legally. I am further satisfied that no injustice has been occasioned here on to the accused. In the circumstances the preliminary objection is hereby dismissed.

As today is already the third day of the court vacation, coupled by the fact that I have a medical appointment at 2pm this afternoon, this case will be now be heard from 19 September 2005 until 23 September 2005.

In the meantime, the remand of the accused is now extended under the provision of s. 259 CPC. They must be brought back to this court on 19 September 2005.